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FILED
MAR 24 1960
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1959

No. 771

CHARLES WALDER, ET AL.,

Petitioners,

v.

PARAMOUNT PUBLIX CORP., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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This is a petition filed by unsuccessful plaintiffs in a private motion picture antitrust action whose arguments when considered by the Court of Appeals for the Second Circuit were characterized as wholly unfounded.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 272 F. 2d 349, and is printed in the Appendix to the Petition at pages A45 et seq.*

*"(Pet.)" refers to the Petition. "(Pet. A—)" refers to the Appendix to the Petition. "(D. A. —)" refers to Respondents' Appendix in the Court of Appeals. "(P. A. —)" refers to Petitioners' Appendix in the Court of Appeals.

The opinion of the District Court is not officially reported, but it is printed in the Appendix to the Petition at pages A40 et seq.

Jurisdiction

Jurisdiction of this Court is invoked under 28 U. S. C. §1254(1). The judgment of the Court of Appeals was entered December 1, 1959.

Counter-Statement of the Question Presented

Will certiorari issue in a case where none of the factors enumerated in Rule 19 exist, where the undisputed record facts clearly show that plaintiffs' business or property could not have been and was not injured in any way by the claimed conspiracy; where plaintiffs, rather than being legally injured, were the beneficiaries, if any conspiracy existed; and where the action is admittedly maintained for the benefit of parties no longer before the Court?

Counter-Statement of the Case

This action, commenced on September 4, 1951, was brought by five groups of plaintiffs, each of which was financially interested either in the ownership or in the operation of the Tivoli Theatre, Miami, Florida at some time prior to or subsequent to 1937. During various proceedings the claims of all of the groups of plaintiffs were dismissed and petitioners have conceded in their brief before the Court of Appeals that such dismissals were proper except for the dismissal as to The Walwal Corporation (as to which an appeal was noted but never prosecuted) and the dismissal as to the Trustees of the Tivoli Operating Corporation which is the subject of the instant petition.

Prior to February 10, 1937, the Tivoli Theatre, Inc. was the lessee and operator of the Tivoli Theatre in Miami, Florida.* Late in 1936 Charles Walder, who was president of The Walwal Corporation (hereinafter referred to as "Walwal") and of Tivoli Theatre, Inc., approached Paramount Enterprises, Inc. (hereinafter referred to as "Enterprises") (D. A. 128a). An agreement was negotiated, the substance of which was that a new corporation, Tivoli Operating Corporation (hereinafter referred to as "Operating"), would be formed to begin business with capital of $2,000. consisting of 100 shares of stock at $20. par value per share and with the stock to be owned 50% by Walwal and 50% by Enterprises; that Walwal would lease the Tivoli Theatre to Operating at a rental of $9600. per year against 15% of the gross receipts for a four year period, subject to cancellation after sixteen months; that Charles Walder would be employed by Operating as the theatre manager; and that Enterprises would handle the licensing of pictures for the Tivoli Theatre, pursuant to an agreement with Operating (D. A. 147a-164a). On February 10, 1937, the agreement outlined above was reduced to writing and was executed (D. A. 147a-164a).

Pursuant to the agreement Operating was incorporated in the State of Florida. Its Certificate of Incorporation which was, of course, drafted by the incorporators prior to the existence of Operating provided (D. A. 161a):

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*For the convenience of the Court we are setting forth a table which shows the owner and lessor and the lessee and operator of the Tivoli Theatre during each of the relevant periods:

Pre-1937	1937-1947	Post 1947
1. Owner and Lessor of Tivoli Theatre Property		
The Walwal Corporation	The Walwal Corporation	The Walwal Corporation
2. Lessee and Operator of Tivoli Theatre		
Tivoli Theatre, Inc.	Tivoli Operating Corporation	Tivoli Amusement Company, Inc.

"THIRD: The maximum number of shares of stock which this corporation is authorized to have outstanding at any time is one hundred (100) shares, of the par value of $20.00 each. All stock issued shall be fully paid and non-assessable. . . ."

"FOURTH: The amount of capital with which this corporation will begin business is two thousand ($2,000.00) dollars."

In accord with the agreement 50 shares of Operating stock were issued to Enterprises and 50 shares to Walwal for which each paid $1,000. This $1,000. payment by each stockholder was the sole consideration for the stock and petitioners' counsel conceded that the lease was not given by Walwal as consideration for the stock (D. A. 119a).

On February 11, 1937, Walwal leased the Tivoli Theatre to Operating (D. A. 165a-182a). Charles Walder, president of Walwal, testified in this action that the rent reserved under the lease was fair (D. A. 124a-127a). The issue of the fairness of the rent was determined by the District Court in three separate opinions which resulted in a judgment dismissing all of the claims asserted by Walwal (D. A. 198a, P. A. 38a, P. A. 64a). In those opinions the District Court considered and reconsidered the record facts and plaintiffs' arguments and held that the rent was fair. An appeal was taken, but, when it was not prosecuted, it was dismissed.

The original four year agreement and lease were subsequently extended.

On or about September 25, 1947, Operating ceased operating the Tivoli Theatre and ceased doing business (D. A. 211a). Walwal for purposes of cancellation surrendered the 50 shares of Operating stock which it held (D. A. 217a) to Enterprises so that prior to dissolution Enterprises owned all of the outstanding stock of Operating.

At the time of the judgment of the District Court from which this appeal was taken, the only claim remaining in the

action was the purported claim by the Trustees of Operating which was summarized in proceedings before the District Judge as being a claim that Operating gave half of its stock to the claimed conspirators as the result of an illegal conspiracy for $1,000. when it was worth a great deal more (D. A. 122a). The other half of Operating's stock, it should be noted, was issued to Walwal for exactly the same amount.

Tivoli Operating Corporation did not assert the usual types of antitrust claims. There was no claim that the run or clearance of the Tivoli Theatre during the period when it was operated by Operating was improper. In fact, the complaint in paragraphs 77, 84 and 87 alleges just the opposite. (Pet. A25-A26, A28, A29). There was no claim that Operating was ever compelled to pay unfair or excessive film rentals. There was no claim that Operating lost money or should have made more money during the period 1937 to 1947.

During the pretrial conferences, defendants moved for summary judgment based upon the undisputed documents, the admissions of Charles Walder and prior holdings of the Court that the rent received by Walwal was fair, the admissions by plaintiffs' attorneys that the lease was not given as consideration for the issuance of the stock and various other admissions of the plaintiffs and their attorneys. The motions for summary judgment were an integral part of full and complete pretrial hearings in this action, pursuant to an assignment of the case to one judge for all purposes. After an exhaustive argument and full briefing, the District Court entered summary judgment on the ground that Operating had not sustained any legal injury as a result of issuing fifty per cent of its stock to Enterprises (P. A. 77a-79a). Plaintiffs moved for reargument and submitted several affidavits (P. A. 80a-108a) but the District Court, in the exercise of its discretion, denied reargument (P. A. 109a).

The matter was fully briefed and argued in the Court of Appeals which unanimously affirmed the summary judgment

in favor of the defendants, on the basic ground that Operating had not suffered legal injury to its business or property within the meaning of the antitrust laws (Pet. A45-A49).

PETITIONERS HAVE SHOWN NO REASON WHY THIS COURT SHOULD GRANT CERTIORARI

It is of the utmost significance that plaintiffs have offered no reason which would justify the exercise by this Court of its discretion to grant a writ of certiorari, except for the assertion that the courts below were "arbitrary and capricious" (Petition, pp. 8, 11).

This is not a case where the Court of Appeals has rendered a decision in conflict with the decision of another circuit on the same matter. This is not a case where there is involved an important undetermined question of law which must be determined. Petitioners' assertion that the court below was "arbitrary and capricious" in rejecting their contentions is not supported by any factual showing whatsoever. The only ground upon which petitioners seek to rely is that their contentions were rejected both by the District Court and by a unanimous Court of Appeals.

Plaintiffs' contentions were carefully argued and briefed in the District Court. The transcript of the argument in the District Court runs to 407 pages and the briefs were complete and exhaustive. The questions were again briefed and argued in the Court of Appeals. Petitioners' briefs in that Court ran to 51 pages; respondents' brief was 65 pages. Full oral argument was had with each side being allowed one hour.

After a careful examination and analysis of petitioners' contentions, both the District Court and the Court of Appeals found that they were utterly without merit. What petitioners now seek to do is to require this Court again to review the facts and ultimately substitute its findings for those of the District Court and the Court of Appeals.

This Court has said it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Prod. Co.*, 336 U. S. 271, 275 (1948). No such showing of error has been made here. To the contrary, as we shall demonstrate, the findings of the courts below were clearly correct.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS WAS CORRECT.

The judgments of the District Court and the Court of Appeals dismissing the claims of Tivoli Operating Corporation were clearly correct.

At earlier stages of the case, counsel for the plaintiffs conceded that "the impact of this conspiracy was not on Operating, ..." (D. A. 120a). That binding concession was in accord with the fact and with the allegations of paragraph 83 of the complaint in which it is asserted that there was coercion upon each of the groups of plaintiffs *other than Operating* (Pet. A28).

The only one of the three groups of plaintiffs which could have suffered any injury as a result of the conspiracy alleged was Tivoli Theatre, Inc., which was the operator prior to 1937 and which, "but for" the alleged conspiracy would have continued to be the operator in the 1937-1947 period (D. A. 134a-135a). The claims of that corporation were dismissed for valid legal reasons, and in the court below petitioner conceded that the dismissal was "correctly premised." In an attempt to avoid the inevitable consequence of that dismissal, plaintiff sought to claim that some causes of action existed on behalf of Operating. It was conceded by petitioners below that this action was not for the benefit of the Trustees of Operating,

but that the Walders were in here "for their own pocketbook" (D. A. 121a-2a). The attempt to shift the claimed cause of action from a plaintiff whose claim had been correctly dismissed to Operating was unavailing because the indisputable record facts and logic demonstrated that Operating suffered no legal injury to its own business or property.

The fact is that "but for" the alleged conspiracy, Tivoli Theatre, Inc. would have continued to operate the theatre and Operating would never have come into existence. During the period when Operating ran the theatre, it obtained pictures on what is concededly a proper run. No claim is made that it was deprived of pictures or otherwise discriminated against by the distributors. Indeed, the charge is directly to the contrary: It is clear that Operating directly benefited from the alleged conspiracy. In these circumstances it is logically and factually apparent that Operating was not legally injured.

A hypothetical case will demonstrate the completely fallacious nature of the claim asserted: Assume that after the alleged conspiracy drove Tivoli Theatre, Inc. out of business, Paramount Enterprises simply leased the theatre from Walwal and operated it, through a wholly-owned subsidiary, on the run upon which it was actually operated by Operating. Could it seriously be asserted that Paramount Enterprises or its subsidiary would have an antitrust claim against the defendants here? Merely to state the question is to demonstrate the untenable nature of plaintiff's position.

The matter is well summarized in the opinion of the Court of Appeals as follows (Pet. A. 48-49):

> "As stated in the preceding paragraphs, Operating Corporation was, according to the Walder complaint, the fruition of the alleged conspiracy in violation of the anti-trust laws; i.e., plaintiffs claim that but for the alleged violations Operating Corporation would never have come into existence. Thus the present plaintiffs complain that the very acts which created their corpo-

ration have also injured it, a difficult position for the trustees here to maintain successfully."

In an attempt to escape from this predicament petitioners took the position that Operating was injured because Enterprises received, as the result of the alleged conspiracy, more from Operating than it contributed. In effect, plaintiffs argue that Paramount Enterprises contributed only $1,000. to the corporation, in exchange for the far more valuable right to proceeds from the management of the theatre, resulting from a claimed favorable lease which Walwal granted to Operating.

Plaintiff's counsel, in the District Court, had conceded that the lease was not consideration paid by Walwal for the stock (D. A. 119a). That concession was in accord with the lease itself which provided in Article 1 (D. A. 165a) that the only consideration for the lease was the rent reserved therein.*

The only contentions inserted in the record at any time were various affidavits submitted in support of a motion for reargument in the District Court. That those affidavits were entitled to no consideration and did not raise any genuine issue of fact is apparent from the face of the documents. The Lefcourt and Pearlman affidavits were based upon assumptions contrary to the record facts, such as the length of the lease. The Walder affidavit attempted to explain his prior sworn testimony as having referred "to the rental for the premises or a like premises of a non-operating business." (P. A. 108a). At his examination. Walder had said the rent was $9600. a year guarantee against 15% of the gross admission receipts (D. A. 126a). It is perfectly obvious that you cannot pay rent of 15% of the gross receipts of a "non-operating business." In any event, such affidavits and petitioners' arguments in connection therewith

*Even if it could be argued that the lease was consideration for the stock, it furnished no actual consideration since the rent received for the lease was fair. That fact was judicially determined in other proceedings in the District Court based upon concessions made by the President of Walwal.

were fully considered by the Court of Appeals, as is clearly demonstrated by the opinion below (Pet. A49).

> "For its $1,000 contribution to Operating's capital Enterprises received exactly what it paid for, a 50% interest in a corporation that had no assets except the capital the two parties paid in. And even if we should assume that there was evidence to support plaintiffs' contention that the rent under the lease was unfairly low and that the point was still open to plaintiffs despite their failure to prosecute their appeal from Judge Leibell's order finding the rent to be fair, the aggrieved party would be Walwal, not Operating. The district court quite properly concluded that Operating could not demonstrate injury. Cf. *Fanchon & Marco, Inc.* v. *Paramount Pictures*, 133 F. Supp. 839, 845 (S. D. N. Y. 1955)."

In the final analysis, this is simply a case where through no fault of the defendants, the only plaintiff which could state a claim—Tivoli Theatre, Inc.—may not maintain this action. We submit that this fact does not give to Operating any claim which it would not otherwise have had.

The petition also takes the position that the Court of Appeals ignored the question of management fees, but fails to call this Court's attention to the fact that the claims were abandoned in the District Court (D. A. 122a). Having abandoned the claims in the District Court during pretrial conferences, petitioners may not raise such claims now.

There is absolutely no justification for the statements in the petition that this case was given "arbitrary and capricious" treatment. The record is clear that all arguments and claims asserted by the petitioners were fully briefed and carefully considered.

This is simply a case in which petitioners, having had a full and fair hearing in the District Court and the Court of Appeals, now seek to have this Court review the case without demonstrating any reason why certiorari should be granted.

CONCLUSION

For each of the reasons set forth above, we respectfully submit that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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